

Outraged by Kansas Justices' Rulings, Republicans Seek to Reshape Court



Chief Justice Lawton R. Nuss, who was appointed to the Kansas Supreme Court by a moderate Republican in 2002, said the current system of selecting justices "is superior to the other models that are being proposed." Credit Orlin Wagner/Associated Press

By **ERIK ECKHOLM**

TOPEKA, Kan. — Washington is locked in partisan warfare over control of the Supreme Court. But it is hardly the only place. Look at the states, where political attacks on judicial decisions are common and well-financed attack ads are starting to jar the once-sleepy elections for State Supreme Court seats.

Nowhere is the battle more fiery than here in Kansas. Gov. Sam Brownback and other conservative Republicans have expressed outrage over State Supreme Court decisions that overturned death penalty verdicts, blocked anti-abortion laws and hampered Mr. Brownback's efforts to slash taxes and spending, and they are seeking to reshape a body they call unaccountable to the right-tilting public.

At one point, the Legislature threatened to suspend all funding for the courts. The Supreme Court, in turn, ruled in February that the state's public schools must shut down altogether if poorer districts do not get more money by June 30.

"A political bullying tactic" and "an assault on Kansas families, taxpayers and elected appropriators" is how the president of the Senate, Susan Wagle, a Republican, responded to that ruling, which was based on requirements in the state Constitution. Mr. Brownback spoke darkly of an "activist Kansas Supreme Court."

In March, in the latest salvo, the Republican-controlled Senate passed a bill to authorize impeachment of justices if their decisions "usurp" the power of other branches. But the climactic battle is expected in the November elections, when conservatives hope to remake the seven-member Supreme Court in a flash, by unseating four justices regarded as moderate or liberal.

Partisan conflict over courts has erupted in many of the 38 states where justices are either directly elected or, as in Kansas, face periodic retention elections, without an opposing candidate. As conservatives in Washington try to preserve a majority on the federal Supreme Court, politically ascendant conservatives in several states are seeking to reshape courts that they consider to be overly liberal vestiges of eras past.

"We've seen this tug of war between courts and political branches all around the country," said Alicia Bannon, a senior counsel at the Brennan Center for Justice at New York University.

Television spending in the election of two justices in Arkansas on March 1 reached \$1.2 million, and candidates attacked as being too cozy with trial lawyers were defeated there, in part with money from outside business interests.

In Wisconsin, where a court seat will be filled in an election on April 5, ads sponsored by out-of-state groups from the left and the right have helped push total campaign spending to more than \$2.6 million, according to data gathered by the Brennan Center and Justice at Stake, a nonprofit group in Washington that promotes judicial integrity.

On the other side, unions and plaintiffs' trial lawyer groups last year spent about \$2.9 million in Pennsylvania on television ads that helped elect Democratic candidates to three Supreme Court seats.

In Oklahoma, where the court is under attack for ruling that a Ten Commandments monument must be removed from the Capitol, bills are being considered that would give the governor and legislative leaders more control over the selection of justices. In Georgia, a Republican bill some described as "court-packing," to increase the number of Supreme Court

seats, has passed the General Assembly.

Driving the conflict in Kansas is the recent dominance of conservative Republicans led by Mr. Brownback. Many legislators say the courts have overstepped their role by ruling that cuts in school funding violate the state Constitution's guarantee of a basic level of education.

"If you're going to make political rulings, then you should be politically accountable," said Senator Dennis Pyle, a sponsor of the bill to broaden the grounds for impeachment.

The impeachment bill is not likely to clear the Legislature this year, but Mr. Brownback is also pushing for an amendment that would give the governor more control over choosing new justices, who are now winnowed through a merit system.

In response to the Supreme Court ultimatum, the Legislature last week passed a plan to give more money to the poorest districts. But the court is also expected to rule in coming months on the more intractable issue of whether the shrunken pool of money for all K-12 education is enough to meet minimum standards.

Since Mr. Brownback took office, state aid has declined to \$3,800 per pupil, from \$4,400, according to the Kansas branch of the National Education Association. Because of the cuts, some rural districts have disbanded, some schools have closed and, last spring, six districts ended the school year days early to cut costs.

Conservatives have also been angered by court rulings against new abortion restrictions and, along with crime-victim advocates, by rulings in murder cases that overturned death sentences on procedural grounds.

All but one of the seven sitting Kansas justices were appointed by a Democrat, former Gov. Kathleen Sebelius, or by her predecessor, a moderate Republican.

Mr. Brownback has condemned the existing system for choosing justices, in which a committee of five lawyers (selected by their peers) and four non-lawyers (appointed by the governor) provides candidates.

In his State of the State address in January, Mr. Brownback said the selection of justices "is controlled by a handful of lawyers" as he repeated his call for an amendment to create "a more democratic selection process."

Chief Justice Lawton R. Nuss, who was appointed by a moderate Republican in 2002 and became chief justice in 2010, responded by telling reporters, "We believe that our present system that has been in effect for almost 60 years is superior to the other models that are being proposed."

"I don't know how much more democratic you can get," he said of the retention elections that justices must face every six years.

Chief Justice Nuss, who keeps a copy of the oath of office on the wall of his chambers and has emerged as a strong defender of judicial independence, sports his signature walrus mustache, which is the subject of a parody Twitter account (@nusstache). He may experience the full fury of that electoral process this fall, when he will be on the ballot.

"This is a full-out power grab by the governor," Ryan Wright, the executive director of Kansans for Fair Courts, said of the efforts to reshape the courts. His group represents liberal and moderate groups that plan to muster support for the sitting justices.

The state's conservatives "believe that they should be able to change the court when there is disagreement about decisions," said Callie Jill Denton, the executive director of the Kansas Association for Justice, the trial lawyers' trade association.

But Senator Jeff King, the chairman of the Judiciary Committee, said, "I think we need to change our judicial selection process, absolutely."

"You don't usually have a Supreme Court issuing rulings that affect 53 percent of the budget," he said of the clash over school funding.

Groups that are expected to try to unseat four justices in November have so far been coy about their preparations and fund-raising. "Preliminary things are going on is all I'll say," said Mary Kay Culp, the executive director of Kansans for Life, an anti-abortion group.

Charles G. Geyh, a professor at the Indiana University Maurer School of Law and the author of "Courting Peril: The Political Transformation of the American Judiciary," warned that increasingly bitter, partisan battles threatened to undermine faith in the courts.

"We need to get past the fiction that judges are umpires that just call balls and strikes," he said. "Ideology will affect their decisions," he acknowledged, "but we need to give them some breathing room. They are not hijacking the law."